

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: March 25, 1993

FAA Order No. 93-11

In the Matter of:

THORAL MERKLEY

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)
) Docket No. CP92GL0254
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)

DECISION AND ORDER

Respondent Thorald Merkley has appealed from the written initial decision issued by Administrative Law Judge Burton S. Kolko on October 21, 1992.^{1/} Judge Kolko found that Respondent exceeded flight time limitations for airmen in violation of the Federal Aviation Regulations (FAR).^{2/} At

^{1/} A copy of the law judge's written initial decision is attached. This case was initially assigned to Administrative Law Judge Robert L. Barton, Jr., who presided at a pre-hearing telephone conference and issued a partial order making findings of fact. The case was subsequently reassigned to Administrative Law Judge Burton S. Kolko, who issued the written initial decision.

^{2/} The complaint alleged that Respondent violated 14 C.F.R. §§ 121.503(d) and 121.521(c)(2) pertaining to supplemental air carriers and commercial operators.

Section 121.503(d), 14 C.F.R. § 121.503(d), provides in part: "[n]o pilot may fly as a crewmember in air carrier service more than 100 hours during any 30 consecutive days."

Section 121.521(c)(2), 14 C.F.R. § 121.521(c)(2), provides in part: "[n]o airman may be aloft as a crewmember more than ... 300 hours during any 90 consecutive days."

Complainant's request, the law judge waived the \$1,000 civil penalty.^{3/}

The complaint alleged that on six occasions between September 16 and November 7, 1988, Respondent acted as a required flightcrew member on air carrier flights when his 30-day flight time exceeded 100 hours. The complaint also alleged that on September 19 and November 7, 1988, Respondent acted as a required flightcrew member in air carrier flights when his 90-day flight time exceeded 300 hours.

Respondent did not file an answer to the complaint, although Complainant advised him that a written answer was required within 30 days after service of the complaint.^{4/} Respondent admitted the allegations contained in the complaint during the pre-hearing telephone conference and in Respondent's response to Complainant's motion for judgment on the pleadings. Judge Barton construed Respondent's admissions as an answer.

Subsequently, Judge Kolko, to whom this case was re-assigned, adopted the findings of Judge Barton and granted Complainant's motion for judgment on the pleadings. In his decision, Judge Kolko rejected Respondent's argument that the air carrier was solely responsible for ensuring that pilots

^{3/} The agency attorney explained that Complainant sought a finding of liability with a waiver of the \$1,000 civil penalty because Respondent had been suspended for 15 days for exceeding the flight time limitations by his employer.

^{4/} See Section 13.209, 14 C.F.R. § 13.209.

not exceed the flight time limitations. The law judge found that pilots are independently responsible under the regulations for keeping their flight time within the flight time limitations.^{5/}

Respondent argues on appeal that he may not have exceeded the flight time limitations, if several hours during which he conducted line checks as a check pilot are excluded from his flight time totals.^{6/} Complainant responds in its reply brief that Respondent may not now challenge the facts alleged in the complaint because Respondent never filed an answer. Respondent, Complainant argues, may not recant on appeal his earlier factual admissions made at the pre-hearing telephone conference and in his response to Complainant's motion.

It is generally true that a party may not raise on appeal matters not previously raised in the record. Respondent, however, raised the issue of his check pilot hours near the

^{5/} Contrary to Respondent's argument on appeal, the law judge's determination was correct. The respective language of 14 C.F.R. §§ 121.503(d) and 121.521(c)(2), that "no pilot may fly" and "no airman may be aloft," places the responsibility for the accounting of flight time on the pilot or airman. See also Administrator v. Richard, 5 NTSB 2198, 2202 (1987) (flight time limitations impose independent responsibilities on pilots and air carriers, and pilots cannot make an air carrier exclusively responsible for their failures to comply with Section 121.503).

^{6/} Respondent states on appeal that between August 16 and September 22, 1988, he conducted 12.4 hours of line checks for pilots on flights with fully qualified crews. He claims that if these hours are excluded from his flight time totals he would not have exceeded the 300 hours/90-day limitation. Furthermore, according to Respondent, he would only have exceeded the 100 hours/30-day limitation on two of the six occasions alleged in the complaint.

conclusion of the pre-hearing telephone conference,^{7/} and in his subsequent letter responding to Complainant's motion. Both law judges regarded Respondent's statements at the pre-hearing telephone conference and in his response to Complainant's motion as an answer, and Complainant did not appeal from that determination. Judge Barton dismissed the matter of the check pilot hours at the pre-hearing telephone conference and did not address it further. He stated that the dates of Respondent's check pilot service preceeded the dates of the complaint allegations, and were thus not covered by the complaint. Respondent, however, noted at the pre-hearing telephone conference that the check pilot hours were at least partially within the 30 and 90 consecutive day periods preceeding the alleged violation dates, and so were relevant to the complaint allegations.

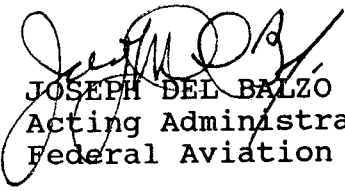
It appears that the factual issue of whether Respondent's flight time totals exceeded the flight time limitations has not been resolved. Complainant in its appeal brief concedes that "...it is true that some check airman time might not count toward FAR maximum flight hours..." (Complainant's Reply Brief at 7).

Judge Kolko should not have granted Complainant's motion for judgment on the pleadings because there remained a genuine

^{7/} See Transcript of Prehearing Telephone Conference, June 15, 1992, at 24.

issue of material fact in dispute.^{8/} Judge Kolko should have determined whether Respondent's flight time exceeded the flight time limitations in light of Respondent's claim concerning his check pilot hours. Respondent, who is proceeding without counsel, cannot be faulted for raising this claim after having made verbal admissions to the law judge during the three-way telephone conversation with the law judge and the agency attorney.

Although there is no civil penalty at stake here, this case must be remanded to the law judge to determine if Respondent's flight time totals on the dates stated in the complaint exceeded the flight time limitations of Sections 121.503(d) and 121.521(c)(2), 14 C.F.R §§ 121.503(d) and 121.521(c)(2). The decision of the law judge granting Complainant judgment on the pleadings is reversed, and the case is remanded for further proceedings in accordance with this decision.


JOSEPH DEL BALZO
Acting Administrator
Federal Aviation Administration

Issued this 24 day of March , 1993.

^{8/} See Section 13.218(f)(5), 14 C.F.R. § 13.218(f)(5), which provides that a law judge shall grant a motion for decision when there is no genuine issue of material fact and the party making the motion is entitled to a decision as a matter of law.